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IN THE

Supreme Court of the United States

October Term, 1969

No. 185

AUGIE REETZ, Commissioner of Fish and Game for the State of Alaska; *et al.*,
Appellants,

v.

JOHN BOZANICH, *et al.*,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

APPELLEES' BRIEF

I.

STATEMENT OF THE CASE

Commercial salmon fishing is the "common calling" of a substantial segment of the population of the Pacific Northwest.

The commercial fishing activity in Alaska occurs from the southern tip of the Alaska Gulf near Ketchikan and extends around to the Alaska Peninsula and North to Kotzebue Sound, employing almost 20,000 fishermen and 10,000 other employees in fish processing occupations.

Pages 1 and 13, 1967 *Alaska Commercial Fisheries Statistics,* "Statistical Leaflet No. 15," Alaska Department of Fish and Game.

Commercial fishing in waters adjacent to the shores of the State of Alaska is, since transition under the Alaska Statehood Act of 1958 (72 Stat. 339, §6 (e)) administered and regulated by the Alaska Department of Fish and Game pursuant to the applicable governing Alaska statutes under Title 16. The regulations of the Alaska Department of Fish and Game are promulgated by a quasi-legislative body designated the Alaska Board of Fish and Game, consisting of up to 10 members. A.S.§16.05.220-320. The administration of the Department of Fish and Game is vested in the Commissioner of the Department under A.S. §16.05.010-210.

The waters of Alaska are divided into 11 geographical salmon registration areas for management and regulation purposes, and these areas in turn are divided into districts and subdistricts. The areas are identified by their location as follows: (A-83)

> "(d) Each registration area shall be assigned a code letter. The registration areas are described as follows:
>
> "(1) Salmon registration areas are:
>
> "Code
> Letter
>
> "A—Southeastern Alaska area
>
> "D—Yakutat area
>
> "E—Prince William Sound area, Copper River-Bering River area and the Yakataga district of the Yakutat area
>
> "K—Kodiak area

"L—Chignik area

"M—Alaska Peninsula area and Aleutian Islands area

"T—Bristol Bay area, and after August 1 and before June 15, the Cinder River, Port Heiden and Ilnik sections of the Northern district of the Alaska Peninsula area

"W—Kuskokwim district of the Arctic-Yukon-Kuskokwim area

"X—Kotzebue district of the Arctic-Yukon-Kuskokwim area

"Y—Yukon district of the Arctic-Yukon-Kuskokwim area

"Z—Norton Sound district of the Arctic-Yukon-Kuskokwim area."

The salmon return from the sea at the end of their e cycle of two to six years at approximately the same me and generally in a mass, known as a "run." The runs ay last for only a week or so, as in the case of the great ristol Bay runs of red salmon, or they may occur over period of six to eight weeks, as in the Southeastern ea.

The runs commence in mid-May and early June in e northern portion of the Southeastern area, reach a ak highlighted by the Bristol Bay run during the first o weeks of July and taper off at the end of August in e southern part of the Southeastern area. Chapter 8, *dustrial Fishery Technology*, 1963, Stansby.

The runs, of course, vary in size and specie and vary size in each location from year to year. The size of ese runs can be roughly predicted, although there are equently surprising variations from these predictions.

These predictions will evaluate a run as a "good run" or a "poor run" and the fishing industry plans the extent of its fishing effort accordingly. See page 59 *National Fisherman Yearbook, Issue of* 1969.

In the past, the fisherman could direct his fishing effort to that area of greatest expected fishing success, or even by-pass an entire season if poor fishing was expected, without jeopardizing his right to subsequently return to the areas of his selection in better years.

The manner, location, periods and permissible means of salmon fishery are controlled both by statute and by the regulations of the State Board of Fish and Game. These regulations are adopted annually and are modified from year to year to meet anticipated conditions.

The regulations of the Board are in turn supplemented by "field announcements" which are directives made at the various particular fishing locations, usually during the course of the run, in which adjustments of either extending or limiting the days or hours during which fishing will be permitted are made in direct response to the size of the actual run as it develops. It is the purpose of these regulations to assure a desirable amount of "escapement" (the number of fish who return upstream to spawn) to assure conservation and maintenance of the fishing runs, and yet to accomplish an economic harvest. This has been the historical method of controlling the fishery while still permitting participation by all who wish to follow this occupation. The number who participate is largely determined by the expectations of the season.

There are two principal and two minor means of commercial fishing. With the exception of Bristol Bay, the

nost universal method is known as purse seining. The urse seine vessel is manned by a crew of 3 to 7. The urse seine is strung in a circle, the bottom is then closed r "pursed," and the fish caught within the closed net re "brailed" or unloaded into the fishhold of the vessel.

A second major method of fishing used, almost exclusively in Bristol Bay[1] and to a large extent in other areas, s known as gill netting. The gill netting vessel is smaller nd manned by one or two fishermen. A net is strung rom the vessel in a line across the direction of the fish un, the fish swim into the net and are caught by their gills. The net is then pulled aboard and the fish are extracted.

A less frequently used method is set netting, whereby a net is staked seaward from the beach during low tide, the fish are caught during high tide in the same manner as gill netting, and are removed at the following low tide. This method does not require a vessel. See *Industrial Fishery Technology, supra*; *Salmon, The Living Resource*, pages 20-22.

All of the above methods, accounting for approximately 95 percent of the entire commercial salmon harvest, require a net gear license to be issued to one of the persons operating the net gear, which person must be the owner or lessee of the net. A.S. §16.05.540 and 16.05.670 (A 80-81); "Statistical Leaflet No. 15," page 6, *supra*.

The last general method of commercial fishing is known as trolling. This method involves trailing bated fish lines

1. Although Bristol Bay is only one area, its production represents approximately 25 percent on the average of the entire Alaska canned salmon pack and in 1965 it represented 50 percent of the entire pack. See *National Fisherman Year Book*, Issue 1969, page 67.

from outrigger poles on a vessel and catching the fis with the traditional baited fishhook. Trolling is principall used to catch the coho and king salmon for the fres and frozen market. It is not sufficiently efficient t harvest a larger run during its peak. Trolling cannot b utilized in Bristol Bay because the shallow, turbid wate obscures the lure and because the predominant specie the sockeye or red salmon, will not normally take a lur and hook and must be caught by net. Trolling require a different type of vessel and entirely different equip ment than purse seining or gill netting. See *Industria Fishery Technology,* page 110, *supra; Pacific Northwes Marine Fishes,* Washington State Department of Fisher ies, July, 1967, page 3; "Statistical Leaflet No. 15," pag 6, *supra,* showing no troll caught salmon in the western region, which includes Bristol Bay, Alaska Peninsula and the Arctic-Yukon-Kuskokwim.

The Alaska Commercial Fishing Regulations are entirely different for trolling than for net fishing. Different locations are open for fishing, different times are made applicable and a host of regulations apply to net fishermen alone. In the Southeastern area trolling is permitted during the entire year while net fishing is restricted to very limited dates. See *Alaska Commercial Fishing Regulations, 1969,* 5AAC §909.330 and Sections 33.310 to 33.350.

Every fisherman must purchase each year a *commercial fishing* license, regardless of whether he is fishing with his own gear or for someone else who has the gear. There are so far no restrictions on obtaining commercial fishing licenses (barring personal disqualification for prior violations). A.S. 16.05.480 (A-80)

Each vessel used in commercial fishing must obtain a *vessel license.* There are no restrictions on the issuance of these licenses, assuming the vessel conforms to the law and regulations in size and equipment. 5 AAC 39.120 (A-82)

In addition, a license must be obtained for each unit of *fish net gear,* which license can only be issued to the person actually owning or leasing the gear and operating or assisting in its operation.

On a purse seine vessel, there is a license for the vessel, a commercial fishing license for each of the three to seven fishermen and a gear license for the person owning the net, usually the Captain. Consequently, a person who does not own and have a license for a fishing net must be employed by someone else who does have such a license. In gill netting, one of the two fishermen in each vessel must have a gear license, and of course there must be a gear license for each set net placed on the beach.

The only method of commercial salmon fishing not requiring a net gear license is trolling, but this method in turn requires ownership of a trolling vessel and trolling equipment, or employment by someone who has such a vessel. Some trollers operate alone and others employ a crew of only one or two. Consequently, the employment opportunity is extremely limited. *Salmon, The Living Resource, supra,* page 22 (4,000 troll fishermen in 2,500 boats).

In 1968, the Alaska Fish and Game Board adopted regulations which for the first time would restrict the issuance of net gear licenses in *each area* to those who were previously licensed in *that area.* The proposed regulations

went through several drafts of varying strictness, but the net result was the limitation of licenses to

> (a) Those previously licensed in that area in any one of the years 1965, 1966, or 1967, or
>
> (b) Those who had made a fishing vessel or net investment commitment between April 16, 1967 and December 16, 1967; (A p. 13-15)

with certain additional provisions regarding hardship and other circumstances. It was under these regulations that the plaintiffs were denied gear licenses for the area of their choice in 1968.

In April of 1968, the Alaska legislature enacted Chapter 186, the principal subject matter of these proceedings, which limits eligibility for net gear licenses in *each area* to an applicant who

> "(1) has previously held a salmon net gear license for that specific salmon registration area; or
>
> "(2) has, for any three years, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area."

The provisions of the statute were even more restricted by the proposed 1969 regulations which limited entitlement to a gear license for a specific salmon registration area only to a person who

> "(A) has held in 1965 or subsequent years a salmon net gear license for that specific salmon registration area; or
>
> "(B) has, for any three years since January 1, 1960, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area."

The effect of the statute and regulations is to freeze all license entitlement in each area to those who have been

fishing in that area for the required duration within the specified years. A fisherman desiring to change areas under these regulations would be compelled to leave his net gear unused for three years and probably his vessel also, while he fished for someone else. The usual distribution of fishing earnings on seine vessels is two shares for the vessel owner, two shares for the net gear owner, and one share for each of the fishermen, including the Master. *Salmon, The Living Resource, supra,* page 22. The fisherman owning the net and vessel would have to sacrifice the earnings on his investment for three years in order to obtain a net license in a different area. The practical effect is to make such change economically unfeasible for any established licensee, even assuming he could obtain employment with another fisherman possessing a net license. The result is the creation of a fishing monopoly in each of the salmon registration areas, with new entry limited to those who accomplish or have accomplished the required number of years of commercial fishing in that area. Although the monopoly created is not complete, it is very substantial.

The same impracticality in qualifying by employment with someone already possessing a gear license in the area would apply equally to qualification through three years of trolling in the new area, even assuming the area was suitable for trolling. The fisherman would have to obtain a trolling vessel, abandon his investment in his fishing nets and his seine or gill net vessel, if he has one, and relinquish his customary method of fishing for a new method.

The statute and regulations, by their text and practical application, would achieve that which was obviously in-

tended—the granting of an exclusive right of fishery in each of the salmon registration areas to those who presently qualify by past licensing or commercial fishing in that particular area for the required duration.

This selective deprivation of the right to fish constitutes a violation of the Equal Protection provision of the Fourteenth Amendment to the United States Constitution. Moreover, this is exactly the sort of privileged treatment which the framers of Alaska's Constitution so clearly intended to prevent when they adopted Article VIII, Sections 3 and 15 of the Alaska Constitution.

II.

SUMMARY OF ARGUMENT

A. The District Court, having jurisdiction both under diversity and the existence of a substantial federal question, properly decided both state and federal issues. Determination of the state law issue was sufficiently clear under the existing constitutional provisions and case authority to render the doctrine of abstention inapplicable. The plaintiffs were entitled to prompt judicial relief.

B. Chapter 186 and the attendant regulations are clearly in conflict with Article VIII, Section 3, "Common Use," and Section 15, "No Exclusive Right of Fishery," of the Alaska Constitution, which incorporates the definition and application of the prohibition of exclusive fishing rights as contained in *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 93 L.Ed. 1231, 63 S.Ct. 968 (1948).

C. Chapter 186 and the attendant regulations constitute

an arbitrary, protective and invidious discrimination which unduly favors a certain group of fishermen to the exclusion of other fishermen, and places the control of access into the privileged group in the substantial control of those vested with the privilege, all in violation of the Equal Protection clause of the Fourteenth Amendment. The imposition of onerous and illusory conditions as a prerequisite to qualifying for the fishing privilege renders the invalidity even more clear.

D. The summary judgment was properly granted because the essential factual findings were either admitted in the record and in argument or arose as the necessary conclusion from application of the pertinent fishing laws and regulations. Furthermore, the appellants did not assert a genuine factual issue as required by Rule 5 (H) (2) of the local court rules.

III.

ARGUMENT

A. The District Three-Judge Court Properly Decided Both the State and Federal Issues in Rendering Promptly the Relief Sought by the Plaintiffs

The plaintiffs are all parties adversely affected by the gear license restrictions of Chapter 186 and the proposed regulations. They are all men who have earned their living for many years by commercial fishing.

The plaintiffs are entitled to proceed in Federal Court to obtain a declaration of these rights under both diversity of citizenship (28 U.S.C. §1332) and the existence of a substantial question in the application of the Federal constitution to the State statute (28 U.S.C. §1332(a)).

The rights involved are valued at substantially more than the required $10,000.

The appellants in fact concede the existence of a substantial Federal constitutional question and consequent Federal jurisdiction under 28 U.S.C. §1331(a) (App. Br. p. 41). The main thrust of their argument is that notwithstanding the existence of Federal jurisdiction and a substantial Federal question, the Federal Court should abstain from deciding the case because the provisions of Article VIII, Sections 3 and 15 of the Alaska Constitution are involved. However, appellants do not urge that this court should abstain from considering the State constitutional issues in any event, but only urge abstention in the event this court does not reverse the District Court on the merits in that court's determination that Chapter 186 and the attendant regulations violate both the Fourteenth Amendment of the Federal Constitution and Article VIII, Sections 3 and 15 of the Alaska Constitution. This statement is based upon the concluding prayer of Appellants' Brief at page 52:

CONCLUSION

"For the reasons set forth above, appellants respectfully pray that this court:

"Reverse the order of the District Court granting summary judgment in favor of appellees and enter judgment in favor of appellants, or, in the event that this court considers that remedy inappropriate, order one or both of the following:

"1. That the District Court hold the case pending a determination by an Alaska Court of the Alaska constitutional issues;

"2. That the District Court consider the merits of the within action in plenary proceedings."

We submit that appellants have waived their right to assert the doctrine of Federal abstention by seeking a favorable decision on the merits from this court and urging abstention only in the event that a favorable decision on the merits is denied. Appellants have indicated their willingness to submit the case on the merits if the result is favorable to them, and we urge that this constitutes a conclusive election to be bound by the determination on the merits, whatever the result. *N.A.A.C.P. v. Button*, 371 U.S. 415, 9 L.Ed.2d 405, 83 S. Ct. 328 (1963).

It has been repeatedly held that once jurisdiction in the Federal Court is established, that court has jurisdiction and the obligation to decide all issues raised in the case arising under both State and Federal law. This doctrine is based on the concept that if parties are entitled to proceed in Federal Court, they are entitled to proceed in that court for all purposes, and on the further basic principle that multiple actions and concurrent proceedings over the same subject matter should be avoided. This concept was clearly announced in the case of *Florida Lime & Avocado Growers v. Jacobsen*, 362 U.S. 73, 4 L.Ed.2d 568, 80 S. Ct. 568 (1959). This case involved a California statute prohibiting the importation of avocados containing less than 8 per cent of oil, a condition which could not be met by Florida avocados. Florida attacked the statute as a violation of the commerce and equal protection clauses of the United States Constitution, and also as in conflict with the Federal Agricultural Marketing Agreement Act of 1937 and Florida Avocado Order No. 69, issued under that Act.

The Supreme Court reversed on the merits, holding at page 80 of 362 U.S.:

> "Cases in this court since *Louisville & N.R. Co. v. Garrett*, 231 U.S. 298, 58 L. Ed. 229, 34 S. Ct. 48 (1913), have consistently adhered to the view that, in an injunction action challenging a state statute on substantial federal constitutional grounds, a three-judge court is required to be convened and has—just as we have on a direct appeal from its action—jurisdiction over *all* claims raised against the statute.[7]" Cases cited.

The case of *Louisville and Nashville Railroad Co. v. Garrett*, 231 U.S. 298 (1912), is particularly applicable to the present case because in the *Garrett* case, the court held at page 304:

> "The reference, undoubtedly, is to an asserted conflict with the Federal Constitution, and the question of unconstitutionality, in this sense, must be a substantial one. But, where such a question is presented, the application is within the provision, and this being so, it cannot be supposed that it was the intention of Congress to compel the exclusion of other grounds and thus to require a separate motion for preliminary injunction, and a separate hearing and appeal, with respect to the local questions which are involved in the case and would properly be the subject of consideration in determining the propriety of granting an injunction pending suit. The local questions arising *under the state constitution* and statutes were therefore before the Circuit Court and the appeal brings them here. They may be first considered." (Emphasis supplied)

The court then specifically considered the constitutionality of a rate making statute under the Kentucky constitution, noting the court's reluctance to hold originally a statute unconstitutional under a state constitution "unless the case imperatively demands such a decision."

he reluctance, shared with the state courts, was not a eluctance to consider the issue but the usual reluctance o hold constitutionally invalid an act of the state's legis- ature.

The *Garrett* case in turn cited *Michigan Central Rail- oad v. Powers*, 201 U.S. 245 (1906), in which the court eld at page 291:

> "Undoubtedly a Federal court has the jurisdiction, and when the question is properly presented it may often become its duty to pass upon an alleged conflict between a statute and the state constitution, even before the question has been considered by the state tribunals. All objections to the validity of the act, whether springing out of the state or of the Federal Constitution, may be presented in a single suit and call for consideration and determination."

Typical of other cases confirming the right and duty of he federal three-judge court to pass on all issues, includ- ing local issues, are *Railroad Commission of California v. Pacific Gas & Electric Co.*, 302 U.S. 388, 82 L.Ed. 319 (1938), holding that all issues in a rate case could be con- sidered, including whether the Commission's order was authorized by the state law; *United States v. Georgia Public Service Commission*, 371 U.S. 285, 9 L.Ed.2d 317, 83 S. Ct. 397 (1963), holding that once a three-judge court is convened, the case can be disposed of below or on appeal *on any ground*, whether or not it would have justified the calling of a three-judge court initially (head- noted 3); *Sigma Chi Fraternity v. Regents of University of Colorado*, 258 F. Supp. 515 [4] (1966), involving abolishment of discriminatory fraternities; and *Ness Prod- uce Co. v. Short*, 263 F. Supp. 586 (1966), holding un- constitutional an act requiring special labeling of im-

ported meat. All of these cases cite or follow either *Florida Lime & Avocado Growers, supra,* or *Railroad Commission of California, supra. Florida Lime & Avocado Growers* has most recently been cited and followed for this general proposition of consideration of all issues in *Flast v. Cohen,* 392 U.S. 83 (1968), 20 L.Ed.2d 947, 88 S. Ct. 1942 under [4-6].

Consistent with the aforequoted authorities establishing that the court may properly pass on all issues in which a substantial constitutional question is presented, the three-judge District Court in the case of *Brown v. Anderson,* 202 F. Supp. 96 (1962), held that Chapter 62 of the Alaska Session Laws of 1961, granting authority to the Alaska Board of Fish and Game to restrict commercial fishing of non-residents under certain circumstances, was unconstitutional under Article I, Section 8, Clause 3 of the Federal Constitution and also violated Article I, Sections 1 and 7 of the Alaska Constitution.

The law appears to be clearly settled that where both a Federal and a State constitutional or statutory issue are involved, a litigant must commence his action in Federal Court if he is to obtain an initial Federal Court ruling on the Federal issue. Stated conversely, if he commences his action in State Court, both State and Federal issues are presented and the only review of Federal issues by a Federal Court would be through such appellate review as might be available to the United States Supreme Court. The State Court determination has been held to be *res judicata* on both the State and the Federal issue even where the parties sought to reserve the Federal issue. See *Wilke & Holzheiser, Inc. v. Reimel,* 266 F. Supp. 168 (1967, Calif.) in which the court observed at page 169:

"Throughout this state appellate proceeding plaintiff has taken the position that it has relied on the provisions of the *Constitution of the State of California* and that it was reserving its challenges under the Federal Constitution for disposition in the United States District Court." (Emphasis supplied)

and the court went on to state its understanding of the abstention doctrine as follows at page 171:

"[4, 5] Plaintiff argues that is would have been an idle act for it to have come to the District Court before proceeding in the State courts because the District Court would have invoked the abstention doctrine and sent plaintiff back to the State courts for determination of the State issues before returning to this Court. However, the exercise by a District Court of the abstention doctrine is not automatic nor can it always be assumed. *Doud v. Hodge*, 350 U.S. 485, 76 S. Ct. 491, 100 L.Ed. 577 (1965); *Florida Lime & Avocado Growers, Inc., v. Jacobsen*, 362 U.S. 73, 80 S. Ct. 568, 4 L.Ed.2d 568 (1960); *Telephone News System, Inc., v. Illinois Bell Telephone Co.*, 220 F. Supp. 621 (N.D. Ill. 1963), aff'd, 376 U.S. 782, 84 S. Ct. 1134, 12 L.Ed.2d 83 (1964). The doctrine of abstention is an extraordinary and narrow exception to the duty of the District Court to adjudicate a controversy properly before it. It involves a discretionary exercise of the court's equity powers and is generally not invoked, except under special circumstances. (Cases cited) Plaintiff cannot escape the *res judicata* effect of the state proceedings by speculation as to what this court might have done if plaintiff had come here in the first place."

The same result was reached by the United States Supreme Court as will be later discussed.

It follows therefore that the "abstention" doctrine of Federal Courts referring State issues under certain circumstances to State Courts, as announced in *Railroad Commission of Texas v. Pullman*, 312 U.S. 496, 85 L. Ed. 971, 61 S. Ct. 643 (1941), will necessarily involve ex-

tended and concurrent proceedings, the possibility that the State action may not be entertained by State Courts while the Federal case is pending, and the deprivation of the plaintiffs' right in a diversity case to have all issues decided by a Federal Court.

The problems of abstention were extensively considered, particularly in Justice Douglas' dissenting opinion, in the case of *England v. Louisiana Medical Examiners,* 375 U.S. 411, 11 L.Ed.2d 440, 84 S. Ct. 461 (1964), in which rules were announced to preserve entitlement to Federal adjudication while proceeding in State Court pursuant to an abstention remand. It obviously involves substantial duplication of effort, expense and attendant delay, and it places the courts in a position of almost competing with each other in making an ultimate disposition. The importance of the fact finding function at the trial court level is complicated where there exists the possibility of conflict between the facts as found by the State on the State issues as compared to the facts which might ultimately be found by the Federal Court on the Federal issues. There may be circumstances where these disadvantages must be endured to obtain a definitive State determination of uncertain State law. We submit that the present case is not such a case.

The balancing of these interests is discussed in *Meredith v. Winter Haven,* 320 U. S. 228, 88 L. Ed. 9, 64 S. Ct. 7 (1943), involving an application for equitable relief against the City of Winter Haven, Florida's proposed bond recall without payment of deferred interest. Jurisdiction was based on diversity only. The Florida law was uncertain on the issue and the Court of Appeals

smissed on the ground that plaintiffs should proceed State Court.

The United States Supreme Court reversed, and ated at page 234 of U.S.:

"But we are of the opinion that the difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision.

"The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its nonexercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment. *Commonwealth Trust Co. v. Bradford*, 297 U.S. 613, 618, 80 L. Ed. 920, 924, 56 S. Ct. 600; *Risty v. Chicago, R.I. & P.R. Co.*, 270 U.S. 378, 387, 70 L. Ed. 641, 650, 46 S. Ct. 236; *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234, 235, 67 L. Ed. 226, 232, 43 S. Ct. 79, 24 A.L.R. 1077; *McClellan v. Carland*, 217 U.S. 268, 281, 282, 54 L. Ed. 762, 767, 30 S. Ct. 501. When such *exceptional circumstances* are not present, denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by *the highest court of the state, would thwart the purpose of the jurisdictional act." (Emphasis supplied)

*[235]

The "exceptional circumstances" are listed in the

opinion as having been found in cases involving crimin prosecution, collection of taxes or fiscal affairs of th State, the State's administrative rate making functio for public utilities, liquidation of a State bank and th domestic policy of the State in providing for review o the reasonableness of its administrative agencies' factu determinations. *Burford v. Sun Oil Co.*, 319 U.S. 31 87 L. Ed. 1424, 63 S. Ct. 1098 (1943).

Most of the cases involve the State's regulatory authorit over parties who are enjoying a special and protecte privilege from the State, such as a common carrier' exclusive franchise certificate which is received in ex change for submission to rate regulations. Althoug the oil drilling cases, such as *Burford v. Sun Oil Co supra*, are not strictly franchise cases, they are very clos because of the blanket limitation and control which ha historically been applicable to oil production to preven draining and to balance the interest of adjacent propert owners. The granting of a right to drill an oil well and it location is essentially equivalent to granting a franchis because such permit must be determined with specifi reference to its effect on existing wills and the geologica condition applicable to that well. The regulations an State appellate procedures are unique in the wide scop given to judicial review. *Burford v. Sun Oil Co., supra*

It is true that the permissible means, locations an times for commercial fishing have been historically con trolled by uniformly applied State law and administrativ regulation in the interest of conservation and maximum sustained yield, but such controls have never, at least to significant and continuous extent, taken the form o franchises or exclusive fishing privileges to particula

persons or groups. Where this has been attempted on the basis of residency, it has been struck down under the equal privileges and immunities clause of the United States Constitution, *Toomer v. Witsell*, 334 U.S. 385, 92 L. Ed. 1460, 68 S. Ct. 1156 (1948), and *Brown v. Anderson*, 202 F. Supp. 96 (1962, D.C. Alaska). However, the same policy would apply to intrastate privileges and is carried into Article VIII, Sections 3 and 15 of the Alaska Constitution.

The importance of protecting this historic common calling raises issues which are far beyond the scope of the special regulatory authority of the State and its agencies. Under these circumstances, the rights of the parties plaintiff for themselves and for others similarly situated reach an importance which fully offsets the Federal-State harmony sought to be achieved by abstention.

There is no case pending in the Alaska State Courts involving these same issues, and plaintiffs could obtain a State decision only by commencing such an action and processing it through the Alaska Supreme Court in accordance with the procedures of *England v. Louisiana Board of Medical Examiners, supra*, and then returning to the Federal Court in the unlikely event that the State Court's decision would be different on the State issue than that announced by the court below.

A stronger argument in favor of this procedure might be made if there was an area of genuine uncertainty and ambiguity in the provisions of the Alaska Constitution, particularly Article VIII, Section 15, as it applied to Chapter 186. As the court below stated at page 304 of 297 F. Supp.:

"Moreover, the legal issues presented do not constitute a proper case for application of the doctrine of abstention. The proper disposition of the case on the merits is too clear, and we have absolutely no doubt that, if the question had been presented to an Alaska court, it would have shared our conviction that the challenged gear licensing scheme is not supportable. See the analysis of authorities in *Zwickler v. Koota*, 389 U.S. 241, 250-251, 88 S. Ct. 391, 19 L.Ed.2d 444 (1967). In *Zwickler*, the Supreme Court stated, 'We have frequently emphasized that abstention is not to be ordered unless the state statute is of an uncertain nature, and is obviously susceptible of a limiting construction.' [Citations omitted.] 389 U.S. at 251, n. 14, 88 S.Ct. at 397."

The following are other cases which have emphasized the uncertainty of the State law as one of the necessary conditions which must exist to create the "special circumstances" for abstention.

Chicago v. Atchison, Topeka & Santa Fe Railway Company, 357 U.S. 77, 2 L.Ed.2d 1174, 78 S. Ct. 1963 (1958), involved the constitutionality of an attempt by Chicago to require licensing of a transfer system between railroad stations. The court denied the contention that the case should be remanded to obtain a State interpretation of the licensing regulations. The court stated at page 84 of U.S.:

"We see no ambiguity in the section which calls for interpretation by the state courts."

Although *Harrison v. N.A.A.C.P.*, 360, U.S. 167, 3 L.Ed.2d 1152, 79 S. Ct. 1025 (1959), applied abstention with the following observation at page 176 of U.S.:

"In the service of this doctrine, which this court has applied in many different contexts, no principle has found more consistent or clear expression than

that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them."

The court then stated in *N.A.A.C.P. v. Bennett*, 360 U.S. 471, 3 L.Ed.2d 1375, 79 S. Ct. 1192 (1959) that reference of a State statute to State Court "should not automatically be made," referring to *Harrison v. N.A.A.C.P., supra,* and clearly indicating that remand to a State Court should only occur where there is an ambiguity or uncertainty calling for interpretation.

This was confirmed in *Harman v. Forssenius*, 380 U.S. 528, 14 L.Ed.2d 50, 85 S. Ct. 1177 (1965) in which the court stated at page 534 of U.S.:

> "The doctrine, however, contemplates that deference to state court adjudication only be made where the issue of state law is uncertain."

Appellants, at page 46 of their brief, cite *City of Meridian v. Southern Bell Telephone & Telegraph Company*, 358 U.S. 639, 3 L.Ed.2d 562, 79 S. Ct. 455 (1959), as applying abstention under circumstances almost identical to the present case. It affirmatively appears in that case that the plaintiffs contended that the statute was not applicable to them, and the Supreme Court further noted at page 358 of U.S.:

> "Here, the state law problems are delicate ones, the resolution of which is not without *substantial difficulty*—certainly for a Federal Court."

Far from being identical with the present case, *Meridian* is another example of cases applying abstention where the State law was uncertain.

The appellants seek to avoid the language of *Zwickler*

v. Koota, supra, and cases reaching a similar result by categorizing them as "civil liberties" cases (App. Br. p. 47).

This is a selective narrowing which appears neither from the cases or the court's language. But even if true, what more important "civil liberty" is there than the right to follow one's historic occupation? Isn't the limitation of that right, even for the several years of judicial review, an example of the impermissible chilling of the very constitutional rights they seek to protect? *Zwickler v. Koota,* 389 U.S. 241, 19 L.Ed.2d 444, 88 S. Ct. 391 (1967).

Appellants argue that Article VIII, Section 15 of the Alaska Constitution has never, "as such," been interpreted by any court (App. Br. p. 43), in apparent recognition of the fact that abstention is not applicable where the legal issue has been decided by the ultimate Appellate Court. *Turner v. Memphis,* 369 U.S. 350, 7 L. Ed.2d 762, 82 S. Ct. 805 (1962).

As is more fully set forth later in this brief under Argument B, Section 15 was intentionally adopted almost verbatim from Section 1 of the White Act after that portion of Section 1 relating to the prohibition of an exclusive right of fishery had been extensively construed in *Hynes v. Grimes Packing Co.,* 337 U.S. 86, 93 L. Ed 1231, 63 S. Ct. 968 (1948).

The United States Supreme Court was at that time not only the Supreme Federal Court but also the Supreme Appellate Court on all issues from the then Territory of Alaska, where the Federal Court System served in the

dual capacity as the Territorial Court of general jurisdiction.

The "no exclusive fisheries" portion of §1 of the White Act was in effect a portion of the Territorial Constitition, and when interpreted by the Supreme Court in the *Hynes* case as prohibiting the granting of special fishing privileges, became the fixed law on that issue. This is particularly true where the White Act provision, as so interpreted, was consciously and deliberately carried into the Alaska Constitution in the form of Article VIII, Section 15.

We submit that with the clarity of the prohibition against exclusive licensing and the entitlement of these appellees to as prompt a decision as is possible to protect the liberty of their lifelong occupation, the doctrine of abstention and remand to State Court should not be applied.

B. Chapter 186 and Regulations Are Clearly in Conflict With Article VIII, Sections 3 and 15 of the Alaska Constitution

Prior to the adoption of the White Act in 1926, 44 Stat. 752, 48 U.S.C. §221, the administration of the Alaska fisheries by the Federal government permitted the practice by administrative order of limiting fishing rights to prior licensees. The right to do so was not judicially tested so far as we can ascertain.

The White Act was a comprehensive piece of legislation to generally provide for and update the management of the Alaskan fishery. A provision in §1 of that Act contained a specific prohibition of the prior practice of restricting fishing privileges in the following language:

"*Provided*, That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and *that no exclusive or several right of fishery shall be granted therein*, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce." (Emphasis supplied)

In 1946, the Secretary of Interior (successor to the Secretary of Commerce in the administration of the Alaska fishery during territorial days), sought to close certain waters off Kodiak Island for fishing to all but members of the Karluk Indian reservation and their licensees.

The regulation was challenged by those excluded from the fishery and reached the United States Supreme Court in the case of *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1948), 93 L. Ed. 1231, 63 S. Ct. 968.

The precise language of the fishing regulation is set forth at pages 91 and 92 of U.S.:

"On March 21 and August 27, 1946, the Secretary of the Interior amended the Alaska Fisheries General

*[92]

Regulations, *50 CFR 1946 Supp., §208.23, that related to the commercial fishing for salmon in the Kodiak Area Fisheries by the addition of a subsection (r), reading as follows:

"'(r) All waters within 3,000 feet of the shores of Karluk Reservation (Public Land Order No. 128, May 22, 1943), beginning at a point on the east shore of Shelikof Strait, on Kodiak Island, latitude 57° 32′ 30″ N., thence northeasterly along said shore to a point 57° 39′ 40″.'

"The foregoing prohibition shall *not apply to fishing by natives* in possession of said reservation, nor

to *fishing by other persons* under authority granted by said natives (49 Stat. 1250, 48 U.S.C.A 358a). Such authority shall be granted only by or pursuant to ordinance of the Native Village of Karluk, approved by the Secretary of the Interior of his duly authorized representative." 11 Fed. Reg. 3105, 9528." (Emphasis supplied)

The pertinent portion of the court's analysis in the *Hynes* case, with particular reference to the purpose of the "no exclusive or several right of fishery" provision of the White Act, is set forth as follows at page 118 of U.S.:

"The validity of the exception permitting fishing by natives in possession of the reservation and their licensees is challenged by respondents because of a proviso in §1 of the White Act, reading:

"'Provided, That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commmerce. . . .'

"Respondents alleged that the exception for fishing by natives and their licensees made §208.23 (r) wholly illegal because it was inconsistent with the proviso of §1 of the White Act as to exclusive or several right of fishery. We have no doubt, however, that the White Act authorizes the establishment of White Act preserves or *closed areas in reservations

*[119]

created, as the Karluk Reservation, under §2 of the Act extending the Wheeler-Howard Act to Alaska. No implications can be drawn from the broad and clear language of the White Act that reservation waters, however valuable for fishing or fish propagation, must be left unprotected from ruthless exploitation.

"What we have said heretofore in this opinion as to the importance of fisheries and their conservation to Alaska natives with reference to the Karluk River area in particular need not be repeated. The quoted section of the White Act gives power to the Secretary so that he may '(c) make such regulations as to time, means, methods and extent of fishing as he may deem advisable.' *Then follows the proviso that every such regulation shall be of general application and that no exclusive or several right of fishing shall be granted therein. This section was enacted to correct alleged abuses that arose in the administration of the Act* 'For the protection and regulation of the fisheries of Alaska,' approved June 26, 1906, 34 Stat. 478, c 3547. By §6 of the earlier act, streams or lakes could be set aside as permanent preserves but not coastal waters. Although the 1906 Act did not delegate regulatory powers in the amplitude of the White Act, fishing reservations in territorial waters were created by Executive Order and regulations were issued thereunder.[47] *The policy behind these regulations and their administration was to restrict the right to fish commercially to those who had formerly fished in these areas.* See Fisheries Service

*[120]

Bulletin No. *92, Jan. 2, 1923. Congress did not propose that these rich fishing grounds should be monopolized by this defined group. *The legislative history of the White Act only emphasizes what the statute clearly says, that is, no special privileges in Alaskan fishing preserves.*[48] The enforcement provisions of the White Act gave stern warning to prospective violators.[49]"

The court observed, as appellants quote on page 39 of their brief, that the waters of Alaska are so vast and the local conditions so varied that it is impossible to prescribe by legislation all necessary provisions and therefore broad powers and wide discretion must be given to the administrative branch. However, the very essence of the

ies case is that notwithstanding its recognition of the essity for this regulatory authority on such a broad pe, it cannot be utilized to conflict with the mandate hibiting special fishing privileges. The court goes on tate at page 122 of U.S.:

"As §208.23 (r) with its exception in favor of the natives in possession of Karluk Reservation and their licensees is based upon §1 of the White Act, we think it clear that its proviso, 'that no exclusive or several right of fishery shall be granted therein,' applies to commercial fishing by natives equally with fishing companies, nonresidents of Alaska or other American citizens and so applies whether those natives are or are not residents on a reservation. We find nothing in the White Act that authorizes the Secretary of the Interior to grant reservation occupants the privilege of exclusive commercial fishing rights. It seems also clear to us that the adoption of a corporate charter and a constitution by the Native Village of Karluk under §§16 and 17 of the Wheeler-Howard Act, discussed at pp. 1248, 1249, *supra*, can add nothing to the power of the Secretary under the White Act.

"'*Exclusive,' as used in §1 of the White Act, forbids not only a grant to a single person or corporation but to any special group or number of people.* The legislative history set out above shows this. The offending regulations which brought about the enactment of the proviso in §1 of the White Act were administered so as to limit fishing to those who had been using the fisheries before the regulations. The White Act fishing preserves were not intended to furnish a monopoly to a favored few. Whatever may be the powers of the Department of the Interior or the natives as to regulating the entrance of persons other than natives in possession of Karluk Reservation into or on the area of land and water in that reservation,[52] they are not broad *enough to allow

> the use of the White Act sanctions to protect the reservation against trespass. White Act sanctions are for White Act violations. . . . The Department of the Interior by §208.23 (r) has decided upon the conservation of fisheries in the described waters of the Karluk Reservation in accordance with the White Act with an exception in favor of the natives that seems to rest on the fact that the natives are on a reservation that includes the White Act conservation area. This cannot be done. The welfare of the 57 electors of Karluk Reservation and their families is important. The Secretary of the Interior, however, cannot give them such preferences as are here given under the authority of the White Act. Other American citizens are equally entitled to the benefits from White Act preserves.[53] [Headnote 21] We hold that the regulation §208.23 (r) is void as a whole because it violates the proviso of the White Act. See p. 1239." (Emphasis supplied)

We have therefore a comprehensive consideration of all of the arguments urged by appellants as to the scope of the regulatory power and the reasonableness of the provisions of the limitations as exemplified by the terms of Chapter 186, and these arguments are given even more impact when applied as in the *Hynes* case to the granting of such exclusive rights in the waters of an Indian reservation which the court finds was validly created. Notwithstanding the recognition of these arguments under those circumstances, the *Hynes* case held that they must yield to the clear mandate of the §1 proviso.

With the full knowledge and awareness not only of this judicial history but the entire situation of the Alaska fishing industry which may reasonably be imputed to the framers of the Alaska Constitution, their deliberate adoption and incorporation of the White Act proviso as interpreted by the *Hynes* case constitutes such a con-

clusive prohibition against the restrictive licensing scheme of Chapter 186 as to preclude any scintilla of a question on the issue.

In proposing Section 15 of the Alaska Constitution, the Natural Resources Committee of the Constitutional Convention made the following commentary:

> "Section 15. *No exclusive right of fishery.* This section is intended to serve as a substitute for the provision prohibiting the several right of fisheries in the White Act. Instead of using the terminology of that act the *purposes sought by it are given expression* in a prohibition of exclusive right or special privileges of any person to the fisheries of the state. (Emphasis added) 'Commentary on Article on State Lands and Natural Resources,' January 16, 1956, p. 9"

The Attorney General of the State of Alaska in his Opinion of February 8, 1968 holding invalid the proposed 1968 regulations limiting licenses to prior licensees, expressly recognized that Section 15 was adopted to prohibit exactly this type of privilege. He stated at page 43 of the Appendix:

> "In view of the interpretation previously provided the White Act it is our opinion that limiting the right to fish for salmon in the Bristol Bay area to those who fished there in 1967 and limiting the right to fish in any other salmon registration area of the state to those who fished in 1966 and 1967 in effect grants those particular fishermen an exclusive right of fishery."

Although the Attorney General subsequently on February 16, 1968 approved the revised 1968 regulations (A. p. 52), as contained in §102.09 (A. p. 13 *et seq.*) which also limited licensees to those holding a prior license or who had made certain described investments,

the Attorney General in the Opinion of February 16 did not attempt to explain or rationalize the change in position (A. p. 52). We again urge as the court below observes (A. p. 75):

> "There is no saving difference between the present licensing scheme and that to which the Attorney General directed his objection. Both would tend to establish monopolistic trade guilds not thought desirable by the framers of Alaska's Constitition."

We submit the same result flows from the application of Article VIII, Section 3:

> "*Common Use.* Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."

It would be difficult to frame language which would more clearly prohibit restricting the right of fishing as between different persons than the language contained in Sections 3 and 15. There is no question that reasonable restrictions of gear, waters, seasons, species and similar factors may be adopted which apply equally to all persons. The law under attack, however, permits some to fish commercially where others are prohibited. This is a restriction of "common use" and a grant of an "exclusive right" and "special privilege" of fishing by definition.

Webster's Unabridged Dictionary, 1950 ed., defines "common" as:

> "1(a) belonging or pertaining to the community at large, either as a social group or as a political organization; public; subject to rights of common use; as, the common pasture, the common good; railroads are common carriers.
>
> "2. shared equally or similarly by two or more individuals or species or by all the members of a group or kind."

Bouvier's Law Dictionary, 1940 ed., defines "common fishery" as a "fishery to which all persons have a right."

It makes no difference in granting a special privilege of fishery whether the number included greatly exceeds the number excluded. A 1 to 1,000 ratio of denials to license grants is still the grant of an exclusive fishery to all but the one, and a denial of common fishery to the one. Further, if the authority exists to select all but one out of a thousand for fishing privileges, then the authority exists to select one out of two, and then to select only one out of a thousand to receive such permission.

The appellants seek to avoid the impact of the plain language of Article VIII, Section 15 and the judicial and constitutional history behind it by urging that the present statute and regulations:

> ". . . creates a much broader class than the regulation disapproved by the Attorney General." (App. Br. p. 37)

It seems manifestly clear that merely enlarging the number who are included within the class to whom the fishing privilege is extended in no manner changes the fact that such an exclusive right is being given. It is exclusive as to those who have the privilege by excluding any persons who had not previously fished in the area.

The fact that a person might qualify for a gear license at a later time by fishing for someone else for three years cannot save the statute. It still remains that for any given season, those applicants are excluded from themselves fishing with nets who have not had a prior license or prior fishing employment in that area.

We believe we have earlier demonstrated in the factual

statement the illusory nature of the so-called provision for new entry. A fisherman owning his own net and vessel could ill afford to abandon his investment for three years of employment by another fisherman holding a net license, assuming such employment could in fact be obtained.

This is especially true of the gill net fishing in the important Bristol Bay area, where there are some single fishermen and at most one fisherman on each vessel in addition to the fisherman having the net gear license. The fisherman with the gear license controls employment and could readily exclude new entrants under the statutory scheme.

The alternative of fishing by trolling does not exist in Bristol Bay and other Western areas. Where it does exist, it still furnishes no practical alternative to the net gear fishermen. The fisherman with net gear and a net gear vessel would not only have to abandon this equipment for the required three years, and but would also have to invest in a trolling vessel and gear or attempt to obtain the limited employment on someone else's troller. No fisherman could afford such an alternative.

Appellants seek to sustain the statute as a safety measure (App. Br. p. 38). It need only be said that conceding the right of the state to provide for safety as well as conservation in the fishing industry, this right must nevertheless be exercised in a manner which does not conflict with the mandate of equally controlling provisions such as the constitutional provisions of Sections 3 and 15. Otherwise, any constitutional provision could be avoided by seeking to justify its disregard through the

exercise of a collateral authority. This was precisely the issue involved in the *Hynes* case, wherein the court recognized the right to create the Indian reservation and adopt regulations relating thereto, but not regulations which conflicted with the common fishery proviso of §1 of the White Act.

We submit that the arguments by appellants are thinly veiled disguises or camouflages for what is manifestly an enactment intended to artificially improve the economic prospects of the fishermen in each area by granting them an effective monopoly and sharply restricting the influx of new fishermen or fishermen from different areas. This results in the Balkanization of the Alaska fishing effort and a serious impeding of the flexibility essential to the industry. Under the present statutory scheme, a single unlicensed fisherman could not even place his small set net on a beach, even though the handling and navigation of a vessel was not in any manner involved.

The true purpose of the enactment is even more apparent when reviewed in its historical context. There have been a number of prior attempts by the Alaska Legislature to create such favored positions. See *Freeman v. Smith*, 44 F.2d 703 (1930), certiorari denied; *Smith v. Freeman*, 282 U.S. 907 ($250.00 license fee for non-resident fisherman against $1.00 fee for resident); *Mullaney v. Anderson*, 13 Alaska 574, 342 U.S. 415, 96 L. Ed. 458, 72 S. Ct. 428 (1952) ($50.00 non-resident license fee to $5.00 resident fee). *Brown v. Anderson, supra* (restricting fishing to residents of particular areas under alleged hardship circumstances), *Tyree, et al. v. Edwards, et al.*, 237 Fed. Supp. 589, affirmed *Alaska v. International Union of Operating Engineers, Local* 302,

393 U.S. 405, 21 L.Ed.2d 633, 89 S. Ct. 684, rehearing denied, 393 U.S. 1112 (1969).

Moreover, appellants' answers to interrogatories propounded by appellees indicate a total absence of any factual basis for contentions that lack of experience on the part of fishermen is related in any manner to management enforcement and public safety problems (A-p. 53-57). None of the defendants, consisting of a commissioner of fishing game and the members of the Fishing Game Board could cite a single example indicating such a relationship.

If safety in operation and obedience to regulations were in fact the compelling purpose to be served by the legislation, then such purpose could easily be satisfied by requirements consistent with the constitutional provisions, including means of demonstrating familiarity with conditions and regulations to be encountered, or provision for having a person so familiar as a member of the crew.

C. Chapter 186 and Attendant Regulations Are In Violation of the Fourteenth Amendment of the United States Constitution

In the court below, appellees urged that Chapter 186 and the attendant regulations violated Article I, Section 8, Clause 3, (the Commerce clause) and the Fourteenth Amendment, Section 1 (the Equal Protection provision) of the United States Constitution and also violated the comparable provisions of the Alaska Constitution. The District Court sustained the contention as to the Fourteenth Amendment and did not reach the other issues.

The Attorney General in his opinion of February 9,

1968, recognized that these clauses, and particularly the Fourteenth Amendment, invalidated the proposed 1968 regulation, which would have limited licenses to prior licensed holders, and found such provisions unconstitutional on these grounds as well as under Section 15 of the Alaska Constitution (A-P 38-41).

In reaching this decision, the Attorney General referred to the case which is still most closely in point of all relevant decisions, *State ex. rel. Bacich v. Huse*, 187 Wash. 75 (1936), 59 P.2d 1101.

This case is particularly strong authority, coming from a sister Northwest state with a similar vital interest in and concern for its salmon industry.

The State of Washington does not have a constitutional provision equivalent to Article VIII, Section 3 "Common Use" and Section 15 "No Exclusive Right of Fishery" provisions in the Alaska Constitution.

As reported in the Attorney General's opinion, the Washington Supreme Court held unconstitutional under Article, I, Section 12 of the Washington Constitution and under the Fourteenth Amendment of the United States Constitution the restriction of gill net licenses to holders which had such licenses in 1932 and 1933. Pertinent portions of the opinion are as follows:

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> "[2] The aim and purpose of the special privileges and immunities provision of Art. I, s 12, of the state constitution and of the equal protection clause of the Fourteenth Amendment of the Federal constitution is to secure equality of treatment of all persons, with-

out undue favor on the one hand or hostile discrim
nation on the other.

"To comply with these constitutional provision
legislation involving classifications must meet an
satisfy two requirements: (1) The legislation mu
apply alike to all persons within the designated clas
and (2) reasonable ground must exist for making
distinction between those who fall within the cla
and those who do not."

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" [3] . . . The question then remains whether ther
is any reasonable basis for distinction between per
sons who held licenses in either of those years an
persons who did not. In our opinion, there is no rea
sonable basis for such distinction. We are of the be
lief that the classification is not predicated on an
fair, just, or natural basis of selection, but is wholl
arbitrary and capricious."

The court in its opinion draws a simile to limiting th
use of highways to drivers holding licenses in particula
years only.

The only significant difference between the Washing
ton statute and Chapter 186 is that Chapter 186 provide
for obtaining a gear license after three years commercia
fishing in the particular area. This factor cannot sav
the statute, particularly since in actual application i
places the right to control entry into the area and t
qualify for a license in the hands of the very persons wh
have obtained the special privilege of being licensed, an
in whose interest it would be to enhance the value o
the right by restriction. The statute provides no alterna
tive or objective method of establishing qualification. A
we previously observed, an applicant could not obtai
the three years' experience unless he could obtain em

ployment from someone who did have a license, or unless he buys and operates a trolling vessel for three years.

Furthermore, the limitation to a particular area is a clearly arbitrary grant of a special privilege for a particular location. The salmon runs vary from season to season and the very flexibility and desirable diversion of fishing effort from poor areas to good ones which is consistent with good fishery management is prohibited by this statute. Should a boat and seine owner in Southeastern have to work three years for someone else in order to fish an adjacent area? Must a fisherman select an area at his peril and have to sacrifice ten percent of his probable working life to utilize his gear in a different area?

It is fundamental to American constitutional law and under the protection of the Fourteenth Amendment that every person has the right to follow a general occupation or calling free from arbitrary, discriminatory and unreasonable restrictions. Justice Field stated at page 757 in a concurring opinion in *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746 (1883), in which a livestock butchering monopoly was defeated:

> "Among these inalienable rights, as proclaimed in that great document[2], is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give them their highest enjoyment.
>
> "The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same condi-

> tions. The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright."

The equivalent statement in the same case was made in a concurring opinion by Justice Bradley, who stated at page 762:

> "The right to follow any of the common occupations of life is an inalienable right; . . To deny it to all but a few favored individuals, by investing the latter with a monopoly, is to invade one of the fundamental privileges of the citizen, contrary not only to common right,but, as I think, to the express words of the Constitution."

This specific statement was cited with approval in *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), at page 587.

Other cases proclaiming the same fundamental right include *Dent v. West Virginia*, 129 U.S. 114 (1888); *Yick Wo v. Hopkins*, 118 U.S. 356, 30 L.Ed. 220, 6 S. Ct. 1064 (1886); *Truax v. Raich*, 239 U.S. 33, 60 L.Ed. 131, 36 S.Ct. 7, (1915); *Adams v. Tanner*, 244 U.S. 590, 61 L.Ed. 1336, 37 S. Ct. 662 (1917); *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 92 L.Ed. 1478, 68 S. Ct. 1138, (1948); *Greene v. McElroy*, 360 U.S. 474, 3 L.Ed. 2d 1377, 79 S. Ct. 1400 (1955); and *Schware v. Board of Bar Examiners*, 353 U.S. 232, 1 L.Ed. 2d 796, 77 S. Ct. 752, (1957).

The appellants cite *McGowan v. Maryland*, 366 U.S. 420 as permitting statutory discrimination under the Fourteenth Amendment: (App. Br. p. 18)

> ". . . if any state of facts reasonably may be conceived to justify it."

The language in cases must be measured against the actual situations involved, and while the criteria announced in the *McGowan* case was considered sufficient to dispose of the incidental sale of amusement articles as related to a Sunday closing law, certainly further considerations are involved in legislation which would exclude citizens from engaging in an important economic endeavor which has been historically open to those who chose to live by the harvest of the sea.

Assuming that limiting the number of fishermen would decrease the fishing effort, this same result can be achieved with far greater flexibility and response to actual conditions by restricting the time and method of fishing without creating a "closed shop" of fishermen in the process. At least where the same result can be achieved by a method which does not infringe on generally accepted rights and freedoms to pursue common callings, such results cannot be achieved by methods which do so infringe.

The appellants attempt to sustain this legislation, which represents a drastic innovation on a historically open occupation, by suggesting at page 24 of their brief a set of circumstances involving pure conjecture as to the "conceived" effects of the so-called lack of experience in each area. The agency charged with the responsibility of administration, regulation and enforcement (the appellants) have compiled no statistics or comparable information with which to support the legislative recitals under Chapter 186 that unrestricted gear licensing has posed additional management, enforcement and public safety problems through:

> ". . . lack of familiarity with regulations, waters, and procedures peculiar to the individual area." (See appellees' interrogatories and appellants' answers to interrogatories at pages 53 through 57 of the Appendix)

If appellants had any supporting factual study relating to the information requested, even though not exactly in the same form as requested, it was their duty under Federal Rule No. 33 to:

> ". . . furnish such information as is available."

It is apparent from the answers to the interrogatories that the statutory recitations were mere window dressing for the real statutory purpose of creating a privileged group of present licensees as relates to net gear fishing.

Appellants argue at page 30 of their brief that the legislature may have had knowledge that the appellants, as the administrative body charged with management, regulation and enforcement of the fishing industry, did not have. This assertion strains credulity and renders all the more objectionable the adoption by the appellants of Section 102.09 of the 1969 regulations which are even more stringent in limiting entitlement to net gear licenses than the provisions of Chapter 186.

Can the legislature find that the issuance of licenses to fishermen who have not previously fished in that area has posed additional management and enforcement problems for the department charged with the management and enforcement responsibilities, where that department does not have information which would sustain any such finding? The following interrogatory answer of appellants is typical in establishing the lack of genuine foundation for the legislative recitals: (A. p. 56)

"Defendants state further that there is no information readily available describing specific incidents wherein additional management problems were caused by licensees with a total lack of experience who fished a particular area."

At least these circumstances would subject the legislation to the closest scrutiny and the "careful consideration" observed in *Morey v. Doud*, 354 U.S. 457, 1 L.Ed. 2d 1485, 77 S. Ct. 1344 (1957).

Assuming without admitting that the legislature could have conceived (1) that the accumulation of gear threatened the salmon resource and (2) that there is a correlation between the amount of net gear and the harvest, and (3) that there were many inexperienced applicants, may the legislature meet these "conceived" problems by restricting entry in such a manner that it results in virtual exclusion for all but present licensees and those who are able to obtain employment from present licensees, as to *each area*?

The statute and regulations in this case are not only so rigid and mechanical as to render them entirely inappropriate as a means of fishing management, but they also result in the "invidious discrimination" prohibited by the Fourteenth Amendment. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 99 L.Ed. 563, 75 S. Ct. 461 (1955); *Morey v. Doud, supra,* and by the court below in the following portions of its opinion (App. p. 71):

"Although a state may enact fishing regulations in the legitimate interests of conservation and safety, it may not, to achieve those ends, employ arbitrary and irrational means which create or protect local, monopolistic interests. Under the scheme, entry into the salmon fishing industry is controlled not by the

state, but by local fishermen in each area who are eligible for gear licenses and can choose among the commercial fishermen, if any, that they might wish to hire. The power to permit competition cannot be vested in *private* interests whose own benefit would ordinarily not be served by assisting potential competitors to qualify.

"We are convinced that the Alaska scheme cannot meet the equal protection requirements set forth in *Morey v. Doud*, [4] wherein the Supreme Court struck down another invidious classification in legislation concerning economic regulation. There, the Supreme Court announced:

"In determining the constitutionality of the Act's application . . . we start with the established proposition that the 'prohibition of the Equal Protection Clause goes no further than the invidious discrimination.' *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489. The rules for testing a discrimination have been summarized as follows:

> " 'The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.' *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79.

"To these rules we add the caution that 'Discriminations of an unusual character especially suggest

careful consideration to determine whether they are obnoxious to the constitutional provision." [Citations omitted.]

"354 U.S. at 463-64, citing other controlling authorities; see *Mayhue v. City of Plantation*, 375 F.2d 447, 450-51 (5th Cir., 1967); *cf Levy v. Louisiana*, 391 U.S. 68, 71, 88 S. Ct. 1509, 20 L.Ed.2d 436 (1968). We can reasonably conceive of no hypothetical state of facts which would justify discrimination in favor of salmon fishers who happened to have held commercial licenses in three years since 1960 or gear licenses in a year since 1965. The defendants suggest that prior experience might be necessary in the interests of safety and conservation management; nevertheless, we perceive no rational basis for the state's placing of selection of the outsiders allowed to gain the necessary 'prior experience' in the industry in the hands of private citizens now eligible for the required license. The defendants suggest that the necessary experience may be gained by an outsider if he fishes commercially in the area for three years, even though such fishing is not with the net-gear necessary to catch salmon. We cannot understand how the 'experience' necessary to fish for salmon might be promoted by requiring the plaintiffs, who are experienced in salmon fishing, or others with no such experience to employ the different techniques incident to fishing for herring or other forms of non-salmon sea life."

Appellants urge with reference to this finding that the ourt assumed facts not established (App. Br. p. 48), et the conclusion follows necessarily from the gear licens-ng provisions, which leave as the only alternative, s observed by the court below, fishing for other types f fish or trolling (the latter method admittedly being less fficient, involving an entirely different method, and not eing useable in some areas).

Under the statute, we have the anomalous situation of a halibut fisherman for three past years in that area being entitled to a net gear license, but an experienced salmon purse seiner from an adjoining area being excluded.

We believe the facts in the present case are in sharp contrast with those relating to family preferences in apprentice applicants as Mississippi Delta pilots in *Kotch v. Board of River Pilots Commissioners for the Port of New Orleans*, 330 U.S. 552 (1947), relied upon so heavily by appellants (pp. 26 and 27 of their brief).

As the court observed in *Kotch*, at page 557 of U.S.:

> "And an important factor in our consideration is that this case tests the right and power of a state to select its own agents and officers. *Taylor v. Beckham*, 178 U.S. 548, 44 L. Ed. 1187, 20 S. Ct. 890, 1009; *Snowden v. Hughes*, 321 U.S. 1, 11-13, 88 L. Ed. 497, 504, 505, 64 S. Ct. 397.
>
> "Studies of the long history of pilotage reveal that it is a unique institution and must be judged as such."

We are dealing in the present case with a common calling dating from the dawn of man, not involving the holding out of a highly specialized skill on which others must place complete reliance and surrender for the time the navigation of their vessels.

The court observed at page 560:

> "Thus in Louisiana, as elsewhere, it seems to have been accepted at an early date that in pilotage, unlike other occupations, competition for appointment, for the opportunity to serve particular ships and for fees, adversely affects the public interest in pilotage.[22]
>
> • • •
>
> "The number of people, as a practical matter, who

can be pilots is very limited. No matter what system of selection is adopted, all but the few occasionally selected must of necessity be excluded. Cf. *Olsen v. Smith, supra,* (195 U.S. 344, 345, 49 L. Ed. 230, 25 S. Ct. 52).[27]...

"We do not need to consider hypothetical questions concerning any similar system of selection which might conceivably be practiced in other professions or businesses regulated or operated by state governments. It is enough here that considering the entirely unique institution of pilotage in the light of its history in Louisiana, we cannot say that the practice appellants attack is the kind of discrimination which violates the equal protection clause of the Fourteenth Amendment."

The narrowness of the *Kotch* case is emphasized by he fact that even in that case, there were four judges lissenting, who felt that the practice of giving prefernce to family members under a statute otherwise posibly valid on its face made the statute a deprivation of qual protection under the doctrine of *Yick Wo v. Hopins,* 118 U.S. 356.

Contrary to appellants' statement at page 27 of their rief, in the *Kotch* case the applicants were not necesarily friends or sons of existing pilots under the statute, or did the situation appear from the face of the statute, et the prevalence of nepotism aroused the dissent and he careful limitation of the majority opinion. In the resent case, decided unanimously by the three judges, wo of whom have spent their legal and judicial career n Alaska and of necessity are intimately familiar with he fishing industry, it was immediately apparent that he proposed gear licensing scheme would result in a rade guild controlled by present licensees and open only o their invitees.

When the practical application of the statute in creating a substantial fishing monopoly is compared with the ease with which the same objectives can be achieved by other methods, the "invidious discriminations" recognized by the court below becomes apparent. Invidious in this context is defined as "unjustly discriminatory" in Funk & Wagnalls and Webster's Dictionaries, 1966 edition.

The appellants cite *Corsa v. Tawes,* 149 F. Supp. 771, as authority to support the power of the legislation in the field of conservation. However, that case merely sustained the authority to abolish purse nets as a type of gear (similar to the abolishment of fish traps in Alaska) and did not pass on the issue of nonresidence because no controversy existed on this issue. In the present case, we are not concerned with the total abolishment of a type of gear but only with limiting the use of such gear to particular persons.

We therefore have a legislative finding of a problem (unsupported by the administrative body most closely involved) endeavoring to justify a program to restrict gear licenses by statute and regulations to prior licensees in each of 11 fishing areas as a means of curtailing the effort by in effect freezing the status quo with an illusory means of new entry. We submit that on the record this program is manifestly unfair and discriminatory and, considering the remoteness of the supposed benefit, the availability of alternatives, and the immediacy of its impact in prohibiting a heretofore existing right expressly recognized by the Alaska Constitution, is so unreasonable as to be in violation of the Fourteenth Amendment.

D. The District Court Properly Granted Appellees' Motion For Summary Judgment and There Was No Factual Issue to Be Adjudicated

The District Court found:

> "Thus, if an outsider wishes to fish for salmon in a given year, and in three years to qualify for his own gear license, his chances are wholly dependent upon obtaining employment under a member of that closed class of fishermen who, in the specified past years, possessed the right to fish the area." (A. 70-71)

Appellants contend that there is nothing in the record to support the above quoted conclusion of the court. (App. Br. p. 48).

As we have earlier demonstrated, this conclusion not only necessarily follows from the application of the various fishing laws and regulations, but the contention as to this fact was consistently made by appellees in their case before the District Court and was nowhere effectively refuted or challenged by the appellants. The trolling exception represents a minimal portion of the fishing effort and is not available in all areas. As to such areas, the court's finding is strictly true and, as to the other areas, it is substantially true at least for purposes of applying constitutional considerations.

The accuracy of the court's finding is established by the appellants' desperate statement at page 48 of their brief:

> "The court disregarded the fact that in order to fish for salmon under a commercial license one may fish without gear."

Appellants do not inform us as to how this could be done.

Appellants were well aware that this was appellees' posi-

tion. Thus, in the amended complaint at page 6 it is leged:

> "The provisions of Chapter 186 of the Laws Alaska, 1968, . . . are also . . . in contravention of aforequoted provisions of the Alaska Constituti to wit, Article I, Sections 1 and 7, and Article VI Sections 3, 15, and 17 and of Article I, Section Clause 3 and the Fourteenth Amendment, Sect 1 of the United States Constitution in that a right fishing gear licenses would be denied some app cants equally entitled thereto under the existing la and an absolute monopoly of gear licenses is grant to those previously licensed in the same area, or w have fished commercially in that area for someo else for three years. A special and exclusive right fishery is thereby granted on the sole basis of pri entitlement or employment by someone else wh prior entitlement."

In appellees' brief supporting its motion for summa judgment, dated January 18, 1969 at page 8, the arg ment was advanced:

> "Contrary to the defendants' assertion in some their argument that anyone can obtain a gear licen within three years by commercial fishing during th period, it should be pointed out that the possibili of obtaining such a gear license is wholly depende upon obtaining employment with some fisherma who holds a gear license during the three years i volved. If the gear licensees elected to limit emplo ment opportunities to their own families, friends townsfolk, the employment opportunity could b come very scarce. This is particularly true in th Bristol Bay Area where there is only one crewma working with each gear licensee. This factor w become even more critical as the value of the r strictive gear license makes it economically desirab for the licensees to limit the opportunity to othe to obtain such a license."

A hearing was held on the motion for summary jud

ment on February 14, 1969 and in oral argument for the first time, appellants contended that there might be some issue of fact as to whether "under this scheme entry into the salmon fishing industry is controlled not by the state, but by the local fishermen in each area who are eligible for gear licenses and choose among the commercial fishermen, if any, that they might wish to hire." (P. 22, Appellants' Statement quoting from Opinion of Court, App. VII of that Statement).

From the provisions of the law and regulations, such control over entry into the salmon fishing industry is abundantly clear. As has been indicated previously, there are two requirements before one may fish for salmon commercially in Alaska, to-wit:

1. An individual commercial fishing license; and
2. A commercial fishing gear license.

A person holding an individual commercial fishing license may only fish with licensed gear. 5 A.A.C. 39.120 (b)(1) of the general provisions of the Alaska Commercial Fishing Regulations of 1969 specifies:

> "No person may operate a net and vessel used to take salmon with such net unless the net and vessel are properly licensed . . . for the registration area selected . . ."

Section 16.05.540 Alaska Statutes specifies:

> "The fishing gear licenses . . . shall be issued one to the applicant. Each applicant shall personally operate or assist in the operation of the licensed fishing gear."

Since a commercial fisherman is only able to fish by net in the area of his choice if he holds a fishing net gear license, it is obvious that such a person may not acquire

three years of fishing experience with net gear in the area unless he can persuade someone who has such a license to permit him to fish on the crew with that person.

> "Under Rule 56, Federal Rules of Civil Procedure, 28 U.S.C.A. following Section 723c, if all of the basic facts are undisputed and the matter is one of interpretation or the reaching of a conclusion by the court, the court may grant a motion for Summary Judgment."

Keele v. Union Pac. R. Co., 78 F.S. 678, 679 (D.C.S.D. Calif., 1948).

Even if it could be contended that there is some issue of fact pertaining to the control by the gear licensees of the entry into the commercial fishing industry under the law and regulations found by the United States District Court to be invalid, appellants may not raise such an alleged issue of fact at this time. Rule 5 H(2) of the General and Criminal Rules United States District Court for the District of Alaska, effective June 1, 1964 as amended March 1, 1967 specifies with reference to a motion for summary judgment:

> "(2) Any party opposing the motion shall, not later than three (3) days prior to the hearing, serve and file a *concise 'statement of genuine issues'* setting forth all material facts as to which it is contended there exists *a genuine issue necessary to be litigated.*" (Emphasis supplied)

Appellants never filed any "statement of genuine issues" and until oral argument, based their position entirely on the legal consequences of the laws and regulations here involved. It is not permissible for such issues to be raised now before the United States Supreme Court.

Should this learned court for any reason feel that a factual issue is involved with reference to the practical necessity of fishing with the owner of a gear license, the case could be remanded to the District Court for a hearing on this issue. It is respectfully submitted, however, that no factual issue remains to be resolved and that in any event appellants may not raise any such issue at this time.

CONCLUSION

The District Court's decision was sound, carefully considered and clearly correct on all issues. As the same result would be achieved if it was correct on either of the principal issues, there is no purpose served by remanding the case for further proceedings. If such a remand is directed, then the appellees should in any event be entitled to a continuation of their injunctive relief pending final determination.

DATED this 29th day of December, 1969.

Respectfully submitted,

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